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NO. 80-706

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

INDUSTRIAL TILE, INC., a corporation,

Petitioner,

versus

JOHN STEWART AND UNITED STATES FIDELITY & GUARANTY COMPANY, a corporation,

Respondents.

REPLY TO THE RESPONDENT JOHN STEWART'S BRIEF IN OPPOSITION

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John Stewart, in his Brief in Opposition to the Petition on Page 2 of the Brief states:

"Furthermore, Petitioner does not present a federal question as required by 28 U.S.C. §1257(3). In any

event, Petitioner is precluded from raising a federal question at this juncture since it was not raised in any prior proceedings."

This is contrary to the clear facts of this case. The objection made at the trial court, while sufficiently broad, specifically points out that the testimony offered concerning the voluntary payment of the fine and the citation issued by OSHA was inadmissible ". . .as to any of these matters that OSHA undertook in administrative proceedings,. . ." See Page 12 of Brief in Opposition.

The preemption issue was also presented by way of Brief to the Supreme Court of Alabama. On Page 16 of the Brief and argument of Appellant, Industrial Tile, the following is contained:

> "Additionally, the Supreme Court of Alabama has mentioned another reason as to why the courts of this State should be very careful in not allowing the regulations under OSHA to have the effect of law in civil proceedings. The reason is in the Act itself. The Legislature of the United States was aware of the problems that might be involved in civil litigation in state courts. The following is found in 29 U.S.C., §653(b)(4):
>
> > '*Nothing* in this chapter shall be construed to supersede or in *any manner* affect any workmen's compensation law or diminish or *affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries,* diseases, or death of employees arising out of, or in the course of, employment' (emphasis supplied)
>
> The admission into evidence in a state civil action of a citation and the assessment of a penalty and the non-contest of that penalty under the 'chapter' referred to above could not help but affect the common law or

> statutes of the State of Alabama under which John Stewart's civil case was brought. The introduction into evidence of the fining capacity of the OSHA representative lends to the citation an official aura far more complex than was ever contemplated by the authors of the Act and its admission into a civil case in the State of Alabama transgresses upon the prohibition of the Legislature of the United States in attempting to limit the scope of the regulations issued under OSHA." Pages 16-17 Brief and argument of Appellant, Industrial Tile in the Supreme Court of Alabama

John Stewart takes the position that the question of preemption is not a federal question and should not be decided by this Court. On that issue this Court has spoken many times. *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941); *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 12, 230 (1947); *Huron Portland Cement Company v. City of Detroit,* 362 U.S. 440, 443 (1960); *Florida Lime & Avocado Growers Inc. v. Paul,* 373 U.S. 132, 142 (1963); *New York Department of Social Services v. Dublino,* 413 U.S. 405, 413 (1972); *DeCana, et. al. v. Bica,* 424 U.S. 351, 356 (1976); *Ray v. Atlantic Richfield Company,* 435 U.S. 151 (1977).

Stewart also claims that Industrial Tile "attaches unwarranted emphasis to the fact that the evidence was admitted by the court below as a 'declaration against interest' ". See footnote number 2, Page 11, Brief in Opposition. If the Act of Congress explicitly states by its terms that:

> "Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or diminish or *affect* in any other manner the common law or statutory rights, duties, *or liabilities* of employers and employees under *any law* with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment." (emphasis supplied)

then why is the citation, fine, and voluntary payment of the fine admissible as a "declaration against interest" where no interest of the employer can be affected. Since the federal statute says the rights and liabilities of employers cannot be affected by OSHA there can be no "declaration against interest". In *Jeter v. St. Regis Paper Company,* 507 F.2d 973 (5th Cir. 1975 Miss.) the 5th Circuit Court of Appeals stated:

> "Although the facts here do not call upon us to decide definitively whether OSHA may create a private right of action by an employee against his employer, we perceive no basis upon which to posit a claim on behalf of Jeter, a non-employee, against St. Regis. St. Regis owes no duty to Jeter under OSHA. There being no duty, there can be no breach. The district court was correct in not submitting this theory of action to the jury."

In essence, there being no interest that can be affected by compliance or noncompliance with OSHA as to the liabilities of an employer, there can be no "declaration against interest" and the Supreme Court of Alabama and the trial court sitting in Alabama improperly allowed the evidence in

light of the federal statute preempting this area.

For the above reasons, the Petition should be granted and the decision of the Alabama Supreme Court concerning Industrial Tile reversed and remanded for a new trial.

Respectfully submitted,

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